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Pharmacy Law Brief: Medications and Lawful Executions

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Pharmacy Law Brief:

Medications and Lawful Executions

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Question: I've read some items recently in the newspaper about a state court case challenging use of medications to carry out court-ordered executions of violent criminals. What is the controversy surrounding use of these pharmaceuticals? I thought that approach had been used for years.

Response: There were several developments late in 2013 related to this topic. In early December, the Circuit Court judge conducting the case for a number of years declined to lift an injunction he had put in place during 2010 that prevented state officials from using lethal injections to carry out the court ordered executions. Then later in the same month officials at the Kentucky Justice Cabinet announced that they would not appeal that ruling, directing their efforts to another approach to the matter.

One of the issues that led to the 2010 injunction barring executions using medications was whether the use of the traditional three drug mixture caused an amount of pain and suffering to be unconstitutional. The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments" with that prohibition being extended to state-level activities by the Fourteenth Amendment and a decision of the U.S. Supreme Court.

Lethal injection was first used in Oklahoma during 1977 and was touted as being a more humane approach to carrying out the court order than the traditional methods of hanging, firing squad, electric chair or gas chamber. The use of pharmaceuticals has traditionally involved sodium thiopental, pancuronium bromide and potassium chloride, in that order. In Kentucky the relevant provision in K.R.S. directs that "every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death."

Earlier in 2013, the Commonwealth put in place procedures dictating use of either one medication or two. Neither the method nor the specific medications to be used met with objections by the judge who has been presiding over this

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case for a number of years. The judge ruled that matters related to the medications used "have been adjudicated to finality." Now the jurist is focusing his current review on how the state will determine whether an inmate is mentally disabled, whether members of the public and defense attorneys can view a sufficient portion of the preparations for the execution and whether the inmate has sufficient access to his or her attorney in the hours leading up to the event.

It should be noted that a case challenging the three drug approach to executions in Kentucky made it all the way to the U.S. Supreme Court during 2008 where use of that lethal injection protocol was upheld. Another case of note related to this topic that was addressed by the nation's highest court arose in 1985 when a group of death row inmates in Oklahoma and Texas challenged the FDA's refusal to bar use of the three drug protocol as rendering the drugs misbranded because these were "unapproved, off-label" uses. The agency had refused to take action on the matter and the U.S. Supreme Court decreed that the agency decision not to act was not reviewable because whether to take action was committed to agency discretion under the Administrative Procedure Act.

As of this writing the Commonwealth has 33 inmates on death row. The last execution in the state was during 2008.

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